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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY RAY ACEVEDO, Defendant and Appellant.	B288341 Los Angeles County Super. Ct. No. BA459754

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed as modified with directions.

Lillian Hamrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Anthony Ray Acevedo was convicted of assault with a firearm with gang and gun enhancements after confronting interlopers in his gang's territory. He contends three of his convictions are not supported by substantial evidence because there was no evidence that he used a loaded firearm or that he pointed it at one victim. We conclude there is sufficient evidence to support the convictions.

We also note that about a year after defendant was sentenced in this case, the trial court recalled defendant's sentence to correct its erroneous imposition of both gang and personal-use enhancements and resentenced him without the gang enhancements. To forestall any confusion about whether the court exceeded its jurisdiction, we modify the judgment to reflect the court's most recent sentence and affirm as modified.

PROCEDURAL BACKGROUND

By information dated August 31, 2017, defendant was charged with three counts of assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2); counts 1–3), with gang (§ 186.22, subd. (b)(1)(B), (C)) and personal-use (§ 12022.5, subd. (a)) enhancements, and two counts of possessing a firearm as a felon (§ 29800, subd. (a)(1); counts 4 & 5).[2] Defendant pled not guilty and denied the allegations.

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[1] All undesignated statutory references are to the Penal Code.

[2] Although the prosecution alleged both serious-felony (§ 186.22, subd. (b)(1)(B)) and violent-felony (*id.*, subd. (b)(1)(C)) gang enhancements for counts 1, 2, and 3, the court dismissed the violent-felony gang enhancements at sentencing.

After a trial at which he did not testify, a jury convicted defendant of all counts and found the allegations true.

The court sentenced defendant to an aggregate term of 19 years in state prison. The court selected count 1 (§ 245, subd. (a)(2)) as the base term and imposed 19 years—the upper term of four years plus 10 years for the personal-use enhancement (§ 12022.5, subd. (a)) and five years for the serious-felony gang enhancement (§ 186.22, subd. (b)(1)(B)), to run consecutively. The court imposed identical 19-year sentences for counts 2 and 3 (§ 245, subd. (a)(2)), to run concurrently with count 1, and the upper term of three years for counts 4 and 5 (§ 29800, subd. (a)(1)), to run concurrently with count 1.

Defendant filed a timely notice of appeal. After briefing in this case was complete, we requested supplemental briefing on whether the trial court was required to stay the gang enhancements attached to counts 1, 2, and 3. In response to our request, the People informed us that the court had recalled defendant's sentence and resentenced him on January 23, 2019, to 14 years in state prison—the original sentence less the gang enhancements, which it stayed. Defendant agreed with the People's explanation.

FACTUAL BACKGROUND

1. July 28, 2017—Counts 1, 2, and 4

On July 28, 2017, at around 9:00 p.m., Salome Sanchez was walking down Venice Boulevard with his fiancée, Genesis Ochoa. They passed a Zumba class and started to dance. At some point, Ochoa told Sanchez to stop dancing; someone was looking at him.

Sanchez turned around and saw a man later identified as defendant.[3]

Defendant was in the driver's seat of a tan or gold SUV, stopped in the right lane. The car was running, and the front passenger-side window was rolled down. There was no one in the passenger seat, and neither Sanchez nor Ochoa could see into the back. The only person they saw was defendant.

Defendant looked them up and down, and, as Sanchez and Ochoa walked away, began to follow them in the SUV. As the couple reached the corner, defendant cut them off and asked, "Hey, where are you from?" Ochoa responded that they did not gang bang, and told defendant to leave them alone. Sanchez ignored him. They walked around the car and proceeded down the street.

Defendant pulled back onto Venice Boulevard and continued to follow Sanchez and Ochoa. He called out, "Fool, I said where you from?" Ochoa answered, "I told you already. We don't—we're not from nowhere." Defendant countered, "Hey, don't play with me. Don't act stupid. I know where you're from." At some point, Sanchez responded, "I ain't from nowhere," and defendant replied, "Quit joking around. I know [you're] from somewhere." Then, defendant yelled "18th Street" and his gang moniker.

The next thing Ochoa knew, she saw an object she described as "this gun" defendant "had next to him … ." It was covered in a yellow towel. Ochoa only saw "part" of the object—the silver "end, the tip of it," which was sticking out of the towel.

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[3] Sanchez and Ochoa both identified defendant in six-pack photo arrays and at trial.

The towel was wrapped around the gun, and defendant's hand was around the towel.

Ochoa explained that defendant's finger "was inside a little, like, a little ring to the gun. And then, you know how you pull it like—you don't pull it but you push the little ring so the bullet come out? He just had it like right there, finger on there in the little ring." Defendant's "hand was like right there. Finger was blocking it, but I [saw] his finger in the ring. So I'm like, you know, he's going to pull the trigger." Defendant was pointing the object straight up.

Sanchez couldn't see what defendant was holding; he just saw the towel over defendant's hand and "the little tube, the little circle for the gun." He testified that defendant was pointing the object at his neck and torso. Every time Sanchez and Ochoa walked away, defendant would move the object to follow them.

Ochoa started getting nervous, and "didn't know whether to run or stay there or duck. [She] was just … like why is he right here pressing on us? I told him more than two times we're not from nowhere." Ochoa pulled out her phone and called 911. Defendant got nervous and drove away, but as Ochoa spoke to the police, she wrote down a partial license plate number: 7XCV13.

Three days later, police stopped a gold SUV with the license plate 7XCV136. Defendant was driving; he was also the registered owner. A search of the SUV revealed a yellow towel but no guns or bullets. Ochoa later identified the SUV as the vehicle she saw that day.

2. July 29, 2017—Counts 3 and 5

On July 29, 2017, around 2:30 a.m., Cesar Molina was working for Soldiers Safety Patrol, the private security company

he owned. He was driving a black Ford Crown Victoria and was wearing a jacket with the company logo. Molina had nine years of military experience (including four years as a special forces officer) in his home country and had been a security guard for 11 years. Though Molina was licensed to carry a firearm in California, he wasn't armed that night.

Molina stopped at a red light. Defendant, driving a tan SUV, pulled up on Molina's right.[4] Defendant's driver-side window was rolled down; Molina's passenger-side window was rolled up. No one was sitting in defendant's front passenger seat. Molina couldn't see into the back seat.

Defendant gestured at Molina to roll down the window. At first, Molina ignored him, but then, thinking defendant might need help, he complied.

Defendant asked, "Are you a fucking cop?"[5] Molina replied that he was a security guard. Defendant retorted, "You smell like a fucking cop," then asked, "What the fuck are you doing in my barrio?" Molina pointed at the patches on his jacket and explained, "I am just a security guard. … Just watch my patches. It says security on them."

Defendant looked angry. He said something like, "Do you want to die today?" then pulled out a gun and pointed it at Molina. Defendant extended his arm out the window and pointed

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[4] Molina later identified defendant's SUV as the vehicle he saw that night and identified defendant as the driver.

[5] Defendant spoke in English. Although Molina testified with the assistance of the Spanish language interpreter at trial, he testified that he understands some English and replied to defendant in English that night.

the gun at Molina's head. The barrel was about six inches from Molina's car.

The gun appeared to be a black 9mm semiautomatic. Molina didn't know if it was loaded or functioning, but he thought it looked real. Defendant had referenced 18th Street at some point, and Molina didn't think a gang member would threaten someone with a toy gun.

Molina ducked down as low as he could and ran the red light. Defendant made a U-turn and headed the other way.

3. Gang Evidence

Los Angeles Police Department Officer Efrain Moreno testified as an expert on the 18th Street criminal street gang.[6] Moreno believed defendant, who had an 18th Street tattoo near his right ear, was an active 18th Street member with the monikers "Lil Troubles" and "Silent." In response to hypothetical questions based on the facts of this case, Moreno opined that the crimes would benefit both the actor and the gang.

DISCUSSION

1. There is substantial evidence to support defendant's convictions for assault with a firearm and possession of a firearm.

Defendant contends that counts 1, 2, and 4 are not supported by substantial evidence because there was no evidence that he used a loaded firearm, and that count 2 is not supported

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[6] Because defendant does not challenge the gang evidence in this case, we do not discuss Moreno's testimony in detail.

by substantial evidence because, assuming he had a firearm, there is no evidence he pointed it at Ochoa.

1.1. Standard of Review

In assessing the sufficiency of the evidence, we review the entire record to determine whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*)

In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may not reweigh the evidence or resolve evidentiary conflicts. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The same standard applies where the conviction rests primarily on circumstantial evidence. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) In short, we may not reverse a conviction for insufficient evidence unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [it].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

1.2. Elements of Assault with a Firearm

To prove defendant committed assault with a firearm (§ 245, subd. (a)(2)), the prosecution must establish:

- the defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person;

- the defendant did the act willfully;
- when he acted, the defendant was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; and
- when the defendant acted, he had the present ability to apply force with a firearm to a person.

(§§ 240, 245, subds. (a)(1)–(3), (b); see CALCRIM No. 875.)

Defendant argues there is no substantial evidence he had the present ability to apply force with a firearm to either Ochoa or Sanchez because there was insufficient evidence either that he used a firearm or that it was loaded. He also argues there is no substantial evidence he had the present ability to apply force with a firearm to Ochoa because though he pointed the item at Sanchez, there is no evidence he also pointed it at her. We address each claim in turn.

1.3. Actual Firearm

First, defendant argues there was insufficient evidence that the item he pointed at Sanchez was a firearm.

A *firearm* is "any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion." (§ 16520, subd. (a).) Clearly, threatening someone with a toy gun or candy pistol does not satisfy this element. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 110–111.) Nor "do pellet guns or BB guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile. [Citation.]"

(*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

Despite this definition's specificity, the prosecution may—and usually does—use circumstantial evidence to prove that an object is a firearm. (*Monjaras*, *supra*, 164 Cal.App.4th at pp. 1435–1436.) "This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Id.* at p. 1436.) But the jury may make those inferences.

Here, the way defendant held the object, with his hand wrapped around the side and his thumb on top, convinced Sanchez it was a firearm. Sanchez was also able to see what he called "the little tube, the little circle for the gun" peeking out from under the towel. When the prosecutor asked him if he was referring to the barrel—the part of the gun that, "if someone [were] pointing a gun directly at you, it would be like looking straight down it"—he said yes. Ochoa likewise saw the barrel's silver tip sticking out from under the towel.

In addition, Ochoa could discern the shape of a gun from the way defendant's hand wrapped around the towel-covered object. Defendant's finger appeared to be poking through the towel into "the little circle" or "ring." The jury could reasonably infer from this testimony that Ochoa saw defendant's finger on the trigger.

The implied threats defendant made while displaying the towel-covered object—by repeatedly calling out his gang name and moniker and insisting Sanchez was lying about not belonging to a gang—when combined with the victims' observations, also

supported a reasonable inference that the object was a firearm. (See *Monjaras*, *supra*, 164 Cal.App.4th at pp. 1434, 1436–1437 [finding substantial evidence an object was a firearm where victim saw what looked like the handle of a pistol tucked into defendant's waistband when defendant lifted his shirt to display the item while ordering her to turn over her purse].)

Taken together, the evidence was sufficient to establish this element of the assault and possession charges.

1.4. Loaded Firearm

Second, defendant argues there is insufficient evidence that the gun was loaded.

To satisfy the present-ability element of assault, the defendant must have an *actual*, not merely apparent, ability to inflict injury. (*People v. Chance* (2008) 44 Cal.4th 1164, 1172–1173, fns. 7, 11 (*Chance*).) Thus, just as assault cannot be committed with a toy gun, it cannot be committed with an unloaded gun unless the gun is used as a bludgeon. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 & fn. 3.) As discussed, there was sufficient evidence from which a reasonable jury could decide defendant pointed a firearm at Sanchez. We conclude the jury could also reasonably infer the gun was loaded.

As with the nature of the object, the prosecution may prove this element using circumstantial evidence. Thus, a "defendant's statements and behavior while making an armed threat against a victim may warrant a jury's finding the weapon was loaded." (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 12 [defendant's threat, while pointing gun at victim's chin, that he " 'could do to you what I did to them' " supported an inference the gun was loaded].)

Here, defendant followed two people who appeared to be members of a rival gang trespassing in 18th Street territory, then repeatedly demanded their gang affiliation while pointing a gun at them. The jury could have reasonably inferred that defendant would not use an unloaded firearm to challenge—and thereby invite violence from—people he believed to be dangerous rival gang members, and then could further infer that the gun was loaded. (See *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 11 [jury could infer defendant gang member would not carry an unloaded gun in an area with prevalent gang violence].)

1.5. Present Ability to Inflict Injury

Third, defendant argues there was insufficient evidence he had the present ability to inflict injury on Ochoa because he did not point the gun directly at her.

The requirement that a defendant have the present ability to inflict injury "is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion." (*Chance*, *supra*, 44 Cal.4th at p. 1168; see *id.* at pp. 1171 ["Although temporal and spatial considerations are relevant to a defendant's 'present ability' … it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct."], 1172 ["when a defendant equips and positions himself to carry out a battery, he has the 'present ability' required … if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken"].) Thus, a defendant may commit assault even if he is "several steps away from actually inflicting injury, or if the victim

is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*Id.* at p. 1168.)

Here, Sanchez testified that defendant pointed an object that appeared to be a gun at Sanchez's torso and moved it to follow him as he walked down the street. Ochoa, however, did not see defendant point the weapon at her or at Sanchez. Instead, she testified that defendant was pointing the gun straight up, had his finger on the trigger, and had a clear line of sight.

In either case, although defendant would have had to take additional steps before he could fire at Ochoa, there was sufficient evidence that he had the present ability to do so. To shoot Ochoa, all defendant had to do was chamber a round if he had not already done so, aim, and pull the trigger. Pointing the gun at Sanchez, who was walking next to Ochoa, was enough to satisfy this element. (See *Chance*, *supra*, 44 Cal.4th 1164 [defendant had present ability to inflict injury where he would have had to turn around, point his gun at the person standing behind him, and chamber a round before shooting]; *People v. Ranson* (1974) 40 Cal.App.3d 317, 319–321 [substantial evidence of present ability to inflict injury where defendant would have had to remove the clip from the rifle, dislodge a jammed cartridge, reinsert the clip, chamber a round, point the weapon, and pull the trigger], discussed with approval in *Chance*, at pp. 1172–1173.)

Accordingly, we conclude there was substantial evidence to support the convictions for counts 1, 2, and 4.[7]

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[7] Defendant's claim that there is insufficient evidence to support count 4, felon in possession of a firearm, is based on his claim that there is insufficient evidence he used a firearm to commit counts 1 and 2. Because we reject that contention, this challenge also fails.

2. The judgment is modified to stay the gang enhancements attached to counts 1, 2, and 3.

2.1. The Erroneous Enhancements

"The STEP Act 'imposes various punishments on individuals who commit gang-related crimes—including a sentencing enhancement on those who commit felonies "for the benefit of, at the direction of, or in association with any criminal street gang." ([ ] § 186.22, subd. (b).)' [Citation.]" (*People v. Francis* (2017) 16 Cal.App.5th 876, 882 (*Francis*).) Through a "series of interlocking provisions … subdivision (b) attaches specific penalties to specific types of crimes—two, three, or four years for a basic felony (subd. (b)(1)(A)); five years for a serious felony (subd. (b)(1)(B)); 10 years for a violent felony (subd. (b)(1)(C)); and a life sentence with a specified minimum parole term for enumerated serious or violent felonies (subd. (b)(4), (5)). Each penalty is mandatory. [Citation.]" (*Id.* at p. 883.)

"In *People v. Rodriguez*, the California Supreme Court held that under section 1170.1, subdivision (f), when a crime qualifies as a violent felony solely because the defendant personally used a firearm in the commission of that felony, the personal use can support either a firearm enhancement (§ 12022.5, subd. (a)) or a violent-felony gang enhancement (§ 186.22, subd. (b)(1)(C)), but not both. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509 (*Rodriguez*).) In *Le*, the Court extended the rule to serious-felony gang enhancements (subd. (b)(1)(B)). ([*People v.*] *Le* (2015) 61 Cal.4th [416,] 425, 429 [(*Le*)].)" (*Francis*, *supra*, 16 Cal.App.5th at p. 881, fn. omitted.)

Nor may the court avoid *Rodriguez* and *Le* by imposing a gang enhancement under section 186.22, subdivision (b)(1)(A), instead. In *Francis*, we held that "because subdivision (b)(1)(A)

unambiguously excludes serious and violent felonies, that enhancement may not be appended to a serious or violent felony." (*Francis*, *supra*, 16 Cal.App.5th at p. 882; *id*. at p. 883 ["While there is discretion embedded *within* subdivision (b)(1)(A) for felonies falling within that provision, a trial court has no discretion to impose a term under subdivision (b)(1)(A) for a felony that falls under (B) or (C)."].)

Here, defendant's firearm use qualified him for both a firearm enhancement and a serious-felony gang enhancement to counts 1, 2, and 3. By imposing terms for both enhancements on each count when it initially sentenced defendant, the court violated section 1170.1, subdivision (f). (*Le*, *supra*, 61 Cal.4th at pp. 425, 429.) As the court may not impose enhancements under section 186.22, subdivision (b)(1)(A), in lieu of the subdivision (b)(1)(B) enhancements, the gang enhancements must be stayed. (*Francis*, *supra*, 16 Cal.App.5th at p. 887.)

2.2. Recall and Resentencing

Under section 1170, subdivision (d)(1), when a defendant is sentenced to state prison, "the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings … or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence."

Here, the court initially sentenced defendant on February 1, 2018. Based on the uncertified minute order submitted by the People, the court apparently resentenced

defendant on January 23, 2019.[8] That is, the court resentenced defendant almost a year after the initial judgment was entered in this case.

It is unclear from the record before us, however, whether the court acted "upon the recommendation of the secretary … or the district attorney of the county in which the defendant was sentenced … ." (§ 1170, subd. (d)(1).) If so, the court properly resentenced defendant; if not, the court exceeded its jurisdiction.

Accordingly, to forestall later confusion about defendant's sentence in this case, we modify the judgment to stay the gang enhancements (§ 186.22, subd. (b)(1)(B)) attached to counts 1, 2, and 3. Defendant is awarded 624 days of custody credit—543 actual days and 81 days conduct credit as of the date of resentencing. The modified sentence reflects the aggregate 14-year term imposed on January 23, 2019. (See § 1260 [court's power to modify judgments on appeal].)

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[8] On our own motion, we take judicial notice of the superior court file in this case. (Evid. Code, § 452, subd. (d)(1).)

DISPOSITION

The judgment is modified to stay the gang enhancements (§ 186.22, subd. (b)(1)(B)) attached to counts 1, 2, and 3. Defendant is awarded 624 days of custody credit—543 actual days and 81 days conduct credit as of January 23, 2019. As modified, the judgment is affirmed.

Upon issuance of remittitur, the trial court is directed to amend the abstract of judgment to reflect the judgment as modified and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The clerk of this court is directed to send a copy of the opinion and remittitur to the Department of Corrections and Rehabilitation. (Cal. Rules of Court, rule 8.272(d)(2).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.